No. 79-180

# In the Supreme Court of the United States

OCTOBER TERM 1979

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SUPREME COURT, U.S.

**PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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---

Your petitioner, Patrick T. Sheedy, Personal Representative for the Estate of Cecelia Binn, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 21, 1979.

## OPINION BELOW

The Opinion of the Court of Appeals for the Seventh Circuit is an unpublished order and appears in the Appendix hereto. The United States District Court for the Eastern District of Wisconsin rendered a decision on February 27, 1978 which as of yet has not been reported, said decision appears in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 21, 1979. Thereafter, a petition for rehearing en banc was timely filed on June 4, 1979 pursuant to Rule 40 of the Federal Appellate Rules of Procedure. Said petition was returned so that the plaintiff-appellant could comply with the local rules of procedure regarding pagination and the like. On June 11, 1979 the petition for rehearing was resubmitted in addition to a motion to file instanter. On June 20, 1979 the motion to file instanter was denied by Circuit Judge, William J. Bauer. This petition for certiorari was filed within 90 days of May 21, 1979. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether United States District Courts have the equitable jurisdiction to invoke equitable remedies in cases involving Internal Revenue Taxation?

2. Whether the Internal Revenue statute of limitations can be equitably tolled or, conversely, whether said statute can bar recovery before the right to recover accrues?



## STATUTORY PROVISIONS

Internal Revenue Code of 1954, Title 26 U.S.C. §1340:

> "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

§6501(a)

> "(a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

§6511(a)

> "PERIOD OF LIMITATION ON FILING CLAIM —Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid."

§7422(a)

> "(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue

tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary according to the provisions of the law in that regard and the regulations of the Secretary established in pursuance thereof."

## STATEMENT OF THE CASE

Cecelia Binn died on April 1st, 1967. Oscar Binn was appointed as personal representative for the Estate of Cecelia Binn later in that year and on November 19, 1969, he filed on the estate's behalf an Estate Tax Return Form 706. That return showed a tax due of Thirty-two Thousand Four Hundred Thirty and 05/100 Dollars ($32,430.05) and also served to commence the running of the statute of limitations. No monies were remitted with said Estate Tax Return.

Subsequently Oscar Binn was removed from his position as personal representative because of his refusal to properly administer and close the estate; he left absolutely no records whatsoever from which the successor personal representative could discern what his predecessor had accomplished.

On October 3, 1973, Attorney Patrick T. Sheedy, was appointed the successor personal representative by the Honorable Michael T. Sullivan, Chief Judge of Milwaukee County Circuit Courts. After his appointment Attorney Sheedy inquired whether or not an Estate Tax Return had ever been filed. The Internal Revenue Service responded, informing the plaintiff that no Estate Tax Return, Form 706 had ever been filed nor a closing letter issued and furthermore contended that the estate tax was due and owing.



Relying on this misrepresentation the estate on April 25, 1974, seventeen (17) months after the limitations period had expired, filed an estate return showing an amount assessed of Twenty-seven Thousand Seventeen and 50/100 Dollars ($27,017.50). Payment of the aforementioned sum accompanied the return and the Internal Revenue Service accepted same and further misled the plaintiff by assessing a penalty for the "late" filing of the return. It was not until May 30, 1977 over three (3) years hence that this penalty was abated.

On November 11, 1976, over two and one half (2½) years after the tax was paid, the Internal Revenue Service for the first time informed the plaintiff that a previous Estate Tax Return had been filed by Oscar Binn. In that letter, from the District Director L. M. Phillips, the Internal Revenue Service committed itself to the full refund of the monies which had been illegally assessed against, and paid by, the estate.

The estate then inquired of the Government when the refund would be forthcoming. After not receiving any response, the estate filed a claim for refund on November 30, 1976; this refund was later amended on May 31, 1977 by the terms of which the estate asked for the illegally assessed amount with interest Thirty-six Thousand Eight Hundred Five and 75/100 Dollars ($36,805.75).

On May 10, 1977, Patrick T. Sheedy received a letter from the District Director of the Internal Revenue Service which stated that the service had obtained legal advice from its Regional Counsel and that the Government had now decided it would not return the money illegally assessed. Because of the government's repudiation, the Estate of Cecelia Binn had no other recourse but to institute a suit for refund, which was filed on June 21, 1977 in the Federal District Court for the Eastern District of Wisconsin.

The action was filed by Patrick T. Sheedy, Personal Representative of the Estate of Cecelia Binn, against the United States of America for the recovery of Thirty-six Thousand Eight Hundred Five and 75/100 Dollars ($36,-805.75), illegally assessed by the Internal Revenue Service after the period of limitations had expired. The defendant, the United States, moved to dismiss the cause for lack of subject matter jurisdiction on the grounds that the plaintiff did not timely file a claim for refund with the Internal Revenue Service. The plaintiff, Patrick T. Sheedy, et al. subsequently moved for summary judgment on the grounds that the United States through material misrepresentations of fact and concealment thereof, prejudiced the plaintiff and consequently should be estopped from asserting the statute of limitations as a bar to the claim and that said statute should be equitably tolled. On February 27, 1978 the Honorable Myron L. Gordon, United States District Judge for the Eastern District of Wisconsin, without oral arguments denied the plaintiff's motion for summary judgment and, asserting that although the equities were in the plaintiff's favor the court could not grant equitable relief in tax cases, granted the defendant's motion to dismiss. Thereafter the Estate of Cecelia Binn, by Patrick T. Sheedy moved to vacate the court's final order and on May 16, 1978, fifteen days after the notice of appeal was filed, said motion was denied by a marginal order.

Thereafter the plaintiff filed an appeal with the United States Court of Appeals for the Seventh Circuit. The court heard the oral arguments on November 6, 1978 and on May 21, 1979 that court rendered its decision in favor of the United States of America. The Court of Appeals held, in short, that a failure to file a refund claim within the statutory period is ordinarily not subject to equitable consideration and in this case there was no reason to depart from well settled principles.



## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH PRECEDENTS SET BY THE UNITED STATES SUPREME COURT AND UNITED STATES CIRCUIT COURTS OF APPEALS CONCERNING THE EQUITABLE JURISDICTION OF THE UNITED STATES DISTRICT COURTS.

### A.

In the United States Supreme Court cases of *Porter* v. *Warner,* 328 U.S. 395, (1945) and *Mitchell* v. *Demario,* 361 U.S. 288, (1959) this court expressly delineated the equitable jurisdiction of United States District Courts. In the *Mitchell* case, the court citing *Porter* v. *Warner,* stated that:

> *"Unless otherwise provided by statute all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.* And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than only a private controversy is at stake. . . .
>
> (T)he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . . *Moreover the comprehensiveness of this equitable jurisdiction is not to be denied or limited in absence of a clear and valid legislative command.* Unless a statute in so many words or by a necessary and unescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity should not be yielded to light inferences or doubtful construction." (Emphasis supplied)

It is submitted that the United States District Courts have original jurisdiction of any civil action arising under any Act of Congress providing for Internal Revenue, to wit, Title 26 U.S.C. 1340. That grant of jurisdiction does not in any way, express or implied, deny the exercise of equitable relief in federal tax cases. Nevertheless, the United States Court of Appeals for the Seventh Circuit has effectively overruled the *Mitchell* and *Porter* cases, by its affirmance of the lower court, which ruled that, ". . . general principles of equity may not be applied in tax cases. . . ." (Appendix p. 4)

The lower court's decision not only conflicts with precedents of the United States Supreme Court, but it also aggravates a continuing schism between the various circuits on the propriety of exercising equitable relief in tax cases. At the present, the Seventh and Eighth Circuits follow the case of *Young* v. *United States,* 203 F.2d 686, (8th Cir. 1953) and deny any equitable relief whatsoever. Whereas the Second, Fifth and Ninth Circuits all utilize equity in the resolution of matters involving Internal Revenue taxation.

In *Miller* v. *United States,* 500 F.2d 1007, (2nd Cir. 1974) an action for refund of income taxes was dismissed by the lower court on the grounds that the statute of limitations had expired. The Court of Appeals reversed, holding that since the I.R.S. had misled the taxpayer it was estopped from asserting the statute of limitations.

> "In sum given that the relevant statute of limitations is by its very terms rather flexible, that there is no collusion with the taxpayer to defraud the federal fisc and that the taxpayer's reliance on the erroneously issued disallowance notice was not unreasonable, we concluded that the government is estopped from raising the earlier deadline as a bar to this action."



The case of *Simmons* v. *United States,* 308 F.2d 938, (5th Cir. 1962) held that equitable estoppel is the suitable remedy in tax cases:

> "It is well settled that the doctrine of equitable estoppel, in proper circumstances and with appropriate caution may be invoked against the United States in cases involving Internal Revenue Taxation."

Despite the fact that the occasions arise infrequently, the I.R.S. should be barred from raising the defense of the statute of limitations when by its words, action or even silence, it intentionally or carelessly induces another to do an act which he would not otherwise have done and which will prove injurious to him if he is not allowed to insist that the I.R.S. not contradict the previous position it has taken.

The Ninth Circuit in the case of *Schuster* v. *C.I.R.,* 312 F.2d 311, (9th Cir. 1962) affirmatively approved of the equitable application of estoppel stating that:

> "We recognize the force of the proposition that estoppel should be applied against the government with utmost caution and restraint for it is not a happy occasion when the government's hands performing duties in behalf of the public are tied by the acts and conduct of particular officials in their relations with particular individuals. Estoppel has been applied against the Commissioner (I.R.S.) in limited situations . . . . Indeed the tendency against government estoppel is particularly strong where the official conduct involves questions of essentially legislative significance as where he conveys a false impression of the laws. Obviously Congress' legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official . . . . But we regard this proposition as one of general application . . . . It is conceivable that a person might sustain such a profound and unconscionable injury in

reliance on the Commissioner's action as to require, in accordance with any sense of justice and fairplay that the commissioner not be allowed to inflict the injury . . . . But as long as the concept of estoppel retains any validity it is conceivable that such situations might arise . . . . Therefore we conclude the Commissioner is estopped . . . ."

**B.**

It is submitted that the court below has created an anomaly by its affirmance of the lower court's decision of May 21, 1979. The Estate must point out that upon appeal it raised the strictly legal issue of whether the trial court committed error in finding as it did, that as a matter of law there are no equitable remedies available in the area of Internal Revenue taxation. This was necessitated by the district court ruling which cited obiter dicta from the case of *Young* v. *United States,* 203 F.2d 686, (8th Cir. 1953) wherein the court stated:

> "For as it has so frequently been said, general principals of equity may not be applied in tax cases but claims must be brought within the scope of statutory authority for their allowance." (App. p. 4)

The district court, based upon this proposition, granted the defendant's motion to dismiss, notwithstanding the court's determination, that all of the equities weighed heavily in the Estate's favor:

> "As previously noted, there are numerous impressive equitable aspects to the plaintiff's claim. . . ." (App. p. 4)

Upon appeal the court ruled that in extraordinary instances equity was available to the litigant:

> "The courts have therefore held that failure to file a claim for refund within the limitations period is a jurisdictional prerequisite and that the failure to file within that period is *ordinarily* not subject to equitable consideration." (App. p. 7) (Emphasis supplied)



The United States Circuit Court of Appeals held that statutes of limitation must be construed strictly but cautioned that there were in fact extraordinary situations wherein equity would be available. Having determined the law the appeals court finally stated that:

> "In this case we find no reason to depart from these well settled principles." (App. p. 7)

In this connection the non sequitur of the Seventh Circuit's reasoning should be apparent when justapositioned with the decision of the United States District Court, to wit:

A. The District Court held that:

1. ". . . general principles of equity *may not* be applied in tax cases. . . ." (App. p. 4) and
2. ". . . there are numerous impressive equitable aspects to the plaintiff's claim." (App. p. 4)

The Estate then raised the issue of the availability of equity on appeal and:

B. The United States Circuit Court of Appeals held that:

1. ". . . the failure to file within that period is *ordinarily not subject to equitable considerations.*" (App. p. 7) and
2. "In this case we find no reason to depart from these well settled principles." (App. p. 7)

It should be readily apparent that the Appeals Court and the District Court have reached opposite conclusions

on both hypotheses, nevertheless the Appellate Court affirmed the decision! The District Court found that the Estate had "numerous impressive equitable aspects" to its claim presumably due to the fact that the Internal Revenue Service fraudulently misrepresented material facts to the estate, which in turn relied on such and paid a tax that was illegally assessed. Nevertheless the Seventh Circuit sat as a fact finder and improperly weighing the facts and held this is not a proper case for an application of equity.

It is respectfully submitted that since the United States Circuit Court of Appeals has ruled that equity is available in extraordinary circumstances the proper resolution of the case would have been a remand to the District Court to determine as fact finder whether or not equity is appropriate in this instance and then allow it to rule accordingly.

It is submitted that United States District Courts have been granted jurisdiction pursuant to Title 26 U.S.C. §1340, to decide cases involving Internal Revenue, and that grant of jurisdiction in no way is limited to the mere exercise of law. Under the doctrine of stare decisis, the Courts of Appeal are bound to apply the precedential cases of *Mitchell* v. *Demario,* supra, and *Porter* v. *Warner,* supra, which specifically state that District Courts have inherent equitable powers to exercise that jurisdiction unless specifically denied by statute. The Seventh and Eighth Circuits refuse to follow these Supreme Court precedents and therefore a conflict now exists between the various circuits.

These conflicts justify the grant of certiorari to review the judgment below.



## II.

## A STATUTE OF LIMITATIONS CANNOT BAR RECOVERY BEFORE THE RIGHT TO RECOVERY ACCRUES AND THEREFORE THE DOCTRINE OF EQUITABLE TOLLING IS A PROPER REMEDY IN CASES INVOLVING INTERNAL REVENUE TAXATION.

Under the Internal Revenue Code, §6511(a) the statute of limitations for the filing of a claim for refund is bifurcated into two different periods: There is a three (3) year period which runs from the time the return was filed or a two (2) year period from the time the tax was paid. In the present case the original tax return, from which the applicable date for computing the commencement of the statute of limitations is determined, was filed on November 19, 1969. Concomitantly with that date in mind then the three (3) year period of limitations (§6511(a)) and the three (3) year period of assessment found in Internal Revenue Code of 1954, §6501(a) both expired on November 19, 1972.

Due to fraudulent misrepresentation of the I.R.S., the tax was paid on April 25, 1974 and thereafter the two (2) year period of limitations running from the date of payment expired on April 25, 1976. It was not until November 11, 1976 that the estate was informed of the illegal assessment and concealment thereof.

Considering the date of the illegal assessment, the date of payment and the date that the estate was informed of true facts, it should be readily apparent that the estate never had requisite knowledge, nor the opportunity to timely file a claim for refund under either of the two periods found in §6511(a). As to the three (3) year period, it had already expired well over seventeen (17) months before the I.R.S. made its misrepresentations and

collected the "overpayment." It is a matter of common sense that in order for the estate to timely file a refund claim within three (3) years, the successor personal representative would have had to, after making and learning of the overpayment, then be able to somehow, proceed back through time and file the claim. This result is as absurd as is the means that the estate would have had to employ in order that it meet the two (2) year period of §6511(a).

Oscar Binn was removed from his position as personal representative because of non-feasance in office, and amongst other things, he kept no records. Either because of his inability to remember or his animosity stemming from his removal, could not or would not supply the necessary information. As a direct result of such, the successor personal representative had no recourse but to ask the I.R.S. whether a return had been tendered. On the basis of false information provided by the agency, the illegally assessed monies were paid. Thus in order for the estate to then have timely filed as to the two (2) year period, the estate first would have had to have reason to disbelieve the I.R.S. and secondly verify that a previous return had in fact been filed, by gaining access to confidential I.R.S. files—which would be an impossible and/or illegal scenario.

One of the issues raised on appeal, was expressed but not resolved in *Kellog* v. *Citizens National Bank of Green Bay*, 330 F.2d 635 (7th Cir. 1964).

> "At least where as here, a substantial part of the usual limitations period remains when the taxpayer learns of the events causing or likely to cause a diminution in his liability, he should file a protective refund claim in order to preserve his position. If he fails to do so he will allow the limitation bar to fall. In a case like this there is no sufficient reason to think that Congress intended anything more than the normal period.



> We do not have in this instance a controversy in which the events invoked by the taxpayer for his refund claim first occurred after the general limitation period had expired. Such a case raises an additional problem—whether there can be a case in which the statute of limitations bars recovery before the right to recover accrues—which we leave undecided for the present."

If the present decision herein is affirmed and the limitations period of §6511(a) is strictly construed then considering the patent misrepresentation and concealment thereof, then there does exist a case in which the statute of limitations bars recovery before the right accrues—or in other words, a wrong without a remedy.

In the case of *Reeves* v. *United States,* 154 F.Supp. 673, (D. Pa. 1957) that court held that the statute of limitations could not commence to run until the cause of action had come into existence.

> "The inequity and palpable injustice which would arise if a taxpayer would be barred from recouping overpayment of inheritance tax or estate tax resulting from a deficiency assessment on a decedent's income tax after the statute of limitations has purportedly run for the recoupment of overpayment of inheritance tax is obvious and not to be disputed.
>
> Revenue Service should not be permitted to impose a deficiency assessment on one hand and by reason of the belatedness of such assessment on the other hand deprive a taxpayer of a right of recoupment to which said deficiency assessment give rise."

The aforementioned cases stand for the proposition that the limitations period runs only from the time of the later operative event so as to prevent what is considered an unjust result. It is only logical that where later events have created an illegal payment of taxes, that the limitation

period should be adjudged to run from the time of the later event. As the Supreme Court stated in *Order of Railroad Telegraphers* v. *Railway Express,* 321 U.S. 342, (1943), statutory limitation periods are:

> ". . . designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded and witnesses disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of state claims in time comes to prevail over the right to prosecute them."

Overpayment in the present situation is due to a misrepresentation made after the first limitation period had expired and the concealment of the true facts prevented a timely claim from being filed in the later (2) two-year period of §6511(a). This is not a situation wherein there is a patently stale claim. The I.R.S. is not using the limitation period as a shield against a stale claim but rather as a sword to collect funds that were uncollectible due to its own misfeasance.

In situations as the present the applicable law, which the United States Court of Appeals for the Seventh Circuit refused to follow, is found in the United States Supreme Court cases of *Holmberg* v. *Armbrecht,* 327 U.S. 392, (1945) and *Bailey* v. *Glover,* 21 Wall 342, (1875). In the *Holmberg* case the court specifically commanded that:

> "And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there is no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey* v. *Glover,* 21 Wall 342, 348; and see *Exploration Co.* v. *United States,* 247 U.S. 435; *Sherwood* v. *Sutten,* 5 Mason 143.
>
> "This equitable doctrine is read into *every* federal statute of limitation." See; *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 392, (1958); also see *Lemon* v. *Kurtzman,* 411 U.S. 201, (1972). (Emphasis supplied)



In this regard now that the Seventh Circuit has rejected equitable tolling in some statutes of limitations, there is now a conflict between Circuits. In the case of *Public Service Co. of New Mexico* v. *General Electric Co.,* 315 F. 2d 306, (10th Cir. 1963), the 10th Circuit has held that:

> "We agree with the statement of the Second Circuit that; As we read the Supreme Court's opinion in *Holmberg* v. *Armbrecht,* supra., that it is applicable unless Congress *expressly* provides to the contrary in clear and unambiguous language.
>
> "If the Supreme Court is disposed to change the *Holmberg* Rule it can do so. If Congress is disposed to forbid tolling by fraudulent concealment it can do so. We are controlled by the decisions and statutes before us."

Although the principle might have been limited to cases where the action itself sounded in fraud, it has not been so confined; in *Hochfelder* v. *Ernst & Ernst,* 503 F.2d 1100, (7th Cir. 1974) the court held:

> ". . . that where a fraud which is the foundation of the suit has actively been concealed or is of such a nature as to conceal itself, the statute of limitation is tolled until the plaintiff has obtained knowledge of the fraud."

This extension of the tolling doctrine to concealment is echoed in *Briley* v. *State of California,* 564 F.2d 849 (9th Cir. 1977):

> ". . . the established rule which we apply in this case, is that where a plaintiff has been injured by fraud or *concealment* and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin until discovery of the injury." (Emphasis supplied)

As applied to this appeal, the district court below ruled that the "return" as used in §6511(a) refers to ". . . the initial return and not either a second return or to an amended return." Holding that since the action taken by the estate was not encompassed under the word "return" in §6511(a), the estate could not fall within the statutory period for allowance of refund claims and dismissed the cause on the grounds that the court would be exceeding its jurisdiction if it granted relief under those circumstances.

The error in this analysis is that the I.R.S. itself was without any jurisdiction whatever to make the assessment when it did so. The Internal Revenue Code of 1954, §6501(a) provides ". . . the amount of any tax imposed by this title shall be assessed within three (3) years after the return was filed."

Furthermore, not only was said assessment illegal but that the facts necessary for the estate to recognize such acts as illegal, were concealed by the I.R.S. for well over two and one half (2½) years after the filing date.

The estate has not contended that the word "return" in §6511(a), applies to the return of April 25, 1974. Rather it was and is the position of the estate that since the government concealed or fraudulently concealed the facts



necessary for the estate to timely file, the right to recover the refund did not accrue until the ". . . discovery of the injury." *Briley* v. *State of California,* 564 F.2d 849, (9th Cir. 1977). The two (2) year period of §6511(a), runs from the date of payment, the date of payment is the date that the estate was injured, therefore the statute of limitations should be tolled on the date of injury (April 25, 1974) and remain tolled until the I.R.S. letter of November 11, 1976, which disclosed the illegality of the assessment.

The United States Appeal Court for the Seventh Circuit disregarded the Supreme Court cases and held that statutes of limitation applicable to suits against the government must be strictly construed and hence cannot be equitably tolled. The obvious error in that analysis is that the *Holmberg* case specifically states that the doctrine is applicable to "every federal statute of limitations." Furthermore it must be pointed out that the Court's reliance upon certain cases in reaching its decision is misplaced because said cases can be readily distinguished from the case at bar.

The case of *Soriano* v. *United States,* 352 U.S. 270, (1957) is cited for the proposition that statutes of limitation must be strictly construed.

The obvious distinctive feature found in the *Soriano* case is that the Supreme Court granted "certiorari" from the Court of Claims which is created under Article I of the United States Constitution. As an Article I Court, its jurisdiction is completely limited to certain enumerated claims:

> "It has been settled since *Kendall* v. *United States,* 107 U.S. 123, (1883) that Congress in creating the Court of Claims gave the Governments consent to be sued therein only in certain classes of claims and that

no others might be asserted against it, including claims which are declared barred if not asserted within the time limited by statute."

Furthermore the court refused to apply the doctrine of equitable tolling on the grounds that the plaintiff asked that it be tolled due to war which was contrary to the express intent of Congress, as opposed to the case at bar, in which the basis for tolling would be the intentional malfeasance of the Internal Revenue Service by fraudulent misrepresentation and concealment thereof.

> "With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitation because of war." *Soriano* v. *United States,* 352 U.S. 270, (1957).

Clearly in determining the equitable jurisdiction of the District Courts (which were created under Article III of the Constitution) a reference to a jurisdictional statement concerning the Court of Claims is totally irrelevant and inapplicable. The Estate must point out the controlling case of *Mitchell* v. *Demario,* 361 U.S. 288, (1959) (decided two years after the *Soriano* decision) which the court overlooked and failed to apply. In *Mitchell* the Supreme Court stated specifically when a District Court has the jurisdiction to grant equitable relief.

The court below also cited the Third Circuit case of *Kreiger* v. *United States,* 539 F.2d 317, (3rd Cir. 1976) as the controlling law in this area. In that case third parties were responsible for the active concealment of information necessary for a filing of a refund claim. The court therein refused to hold the government responsible for the acts of the third parties:

> "Even if we were to conclude that there might be circumstances compelling enough to justify tolling for fraudulent concealment in a suit against the government *such circumstances are not present here. The fraudulent concealment of which these plaintiffs complain is that of a stranger to the cause of action and can in no way be attributed to the defendant.* The circumstance takes the present case beyond both the established scope and the rationale of the *Holmberg* Doctrine. Plaintiffs have cited no cases applying the tolling doctrine where the fraudulent concealment was that of a third party." (Emphasis supplied)



It should be clear that in the present case the concealment was by a "party" to the action not by some extraneous stranger who had no relation to the controversy. The *Kreiger* case merely stands for the proposition that when third party concealment is involved, the circumstances are insufficient to charge a party to the action with equitable tolling:

> "Kreiger was simply a tax refund case, not involving constitutional issues where this court refused to toll the tax refund statute of limitations, 26 U.S.C. 6511(a) *on a theory of fraudulent concealment by a third party." Neely* v. *United States,* 554 F.2d 115, (3rd Cir., 1977) (Emphasis supplied)

The other cited case was that of *Bryan* v. *United States,* 99 F.2d 549, (10 Cir. 1938), wherein the reviewing Court did not hold that equitable tolling is unavailable in tax cases but rather stated that under the facts therein the remedy would be inappropriate. The remedy was denied the taxpayer on the grounds that the government agents had exceeded the scope of their authority and since they were acting outside of their employment the government could not be held responsible:

> "It was not part of the duties of the agents and representative to conceal incorrect income tax returns and excessive payments of income taxes. In so doing they clearly acted without and beyond the scope of their authority. . . *the fraudulent concealment must have been that of the party sought to be charged. . . .*"

Thus the law in this area is patently clear, equitable tolling is permissible in certain situations and under the proper circumstances. In *Bryan* the remedy was denied due to a finding of fact that the agents acted in excess of their authority, concomitantly in *Kreiger* the remedy was unavailable because third party action concealed the fraud, which could not be in turn attributed to the U S. Government. The bottom line is that before a court can grant the remedy of equitable tolling it must be assured that a party to the action was culpable in concealing the fraud.

It is submitted that there is considerable disagreement on the subject of equitable tolling between the various Circuits, and this court should grant certiorari to decide the important federal question of whether equitable tolling is available in tax litigation and in what circumstances.

## CONCLUSION

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation or exclude the injured party from legal redress . . . ." *Marbury* v. *Madison*, 1 Cranch 137, (1803).

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

PATRICK T. SHEEDY, Personal Representative of the ESTATE OF CECELIA BINN, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### DECISION AND ORDER

The plaintiff has moved for summary judgment, and the defendant has moved to dismiss for lack of jurisdiction over the subject matter. The complaint in this action seeks a refund of $36,805.75, which sum the plaintiff contends was illegally assessed by the internal revenue service after the period of limitations had expired.

The plaintiff contends that the original personal representative of the estate of Cecelia Binn was removed because of his failure properly to administer the estate. Cecelia Binn died on April 1, 1967, and the plaintiff, Mr. Sheedy, was appointed as successor personal representative on October 3, 1973.

After his appointment, he inquired of the government "whether an Estate Tax Return had ever been filed." He was told that there had been no filing and that a tax was due. Thereupon, the successor personal representative filed an estate tax return and paid the tax. Over two years later, the internal revenue service, in a letter dated November 11, 1976, informed Mr. Sheedy that an estate

tax return had in fact been filed by the original personal representative on November 19, 1969, but that no payment of the tax had been made at that time. The letter of November 11, 1976, went on to state:

> "It appears that the statutory period in which we could legally have assessed and collected any estate tax has expired.
>
> "No party of the payment made by you will be assessed or retained without correspondence from you stating that your payment after expiration of the statutory period is voluntary."

Subsequently, the defendant withdrew its suggestion that a refund would be made, and now the government vigorously resists the plaintiff's claim for a refund. The government's present position is that the plaintiff is barred by statute from pursuing this claim for a refund because more than three years have expired since the estate tax return was filed and more than two years have expired from the time the tax was paid.

The equities in this matter weigh heavily on the side of the plaintiff. The defendant does not deny that when Mr. Sheedy became the successor representative, he inquired whether a return had been filed and was advised by the government that no such filing had been made. In obvious reliance on such representation and in furtherance of what the successor representative quite properly assumed to be his legal responsibility, he prepared and filed an estate tax return and caused the tax to be paid. Within a few days thereafter, the government assessed a late filing penalty, although it was subsequently abated.

The plaintiff was not apprised of the fact that a previous return had been filed by the original representative until November 11, 1976. It is thus apparent that the successor representative filed a federal estate tax return upon the



mistaken assumption that none had been previously filed and that he paid a federal estate tax at a time when the government would not have been able to assess such obligation upon the estate of Cecelia Binn. It is also apparent that the filing of the second federal estate tax return and the payment of the tax were both made by the successor personal representative upon the basis of misinformation provided by the defendant after October 3, 1973.

Notwithstanding all of the foregoing equitable aspects in support of the plaintiff's claim, the government contends that it was Mr. Sheedy's obligation to ascertain whether an original return had been filed by his predecessor. The government also argues that no double tax is involved—that the estate has made but one payment, with no penalty. In other words, the internal revenue service argues that the estate of Cecelia Binn "has been deprived of a windfall" but has made only one payment of its tax.

The principal thrust behind the government's motion to dismiss is that notwithstanding the matter of equities, the plaintiff's alleged right to sue for a refund is precluded by statute. 26 U.S.C. § 6511(a) provides that a claim for refund of an overpayment

> ". . . in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, . . ."

Under this statute, the only way that the plaintiff could qualify as having made a timely claim for refund would be to treat the word "return" as applying to the second return filed in April, 1974. However, the government urges that it is the first return, filed in November, 1969, which "triggered all relevant statutes of limitations." The second filed return must be treated as an "amended" return under the government's analysis.

The words "the return" are used in the singular, and I believe that such words in § 6511(a) refer to the initial return and not to either a second return or to an amended return. In spite of the equities previously noted in support of the plaintiff's position, there is applicable here the comment of the court of appeals for the eighth circuit in Young v. United States, 203 F.2d 686, 689 (8th Cir. 1953), where the court noted that if taxpayers

> ". . . do not bring their claim within the orbit of some congressional authorization for its allowance, the courts are powerless to grant them relief. For as it has so frequently been said, general principles of equity may not be applied in tax cases, but claims must be brought within the scope of statutory authority for their allowance."

As previously noted, there are numerous impressive equitable aspects to the plaintiff's claim. The statutory provisions regarding taxes are not, however, always based on an individual's sense of fairness or even on fair play. Under all the circumstances, I find that the court is without authority to entertain the plaintiff's application, and therefore the defendant's motion to dismiss must be granted.

Therefore, IT IS ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the defendant's motion to dismiss be and hereby is granted.

IT IS FURTHER ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 27 day of February, 1978.

MYRON L. GORDON

U. S. District Judge



## APPENDIX B

For the Seventh Circuit
Chicago, Illinois 60604

May 21, 1979

(ARGUED NOVEMBER 6, 1978)

Before

Hon. Thomas E. Fairchild, Chief Judge

Hon. Philip W. Tone, Circuit Judge

Hon. William J. Bauer, Circuit Judge

PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,

Plaintiff-Appellant,

No. 78-1615 vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.—No. 77 C 382
Myron L. Gordon, Judge.

### ORDER

Patrick T. Sheedy, as successor personal representative for the estate of Cecelia Binn, instituted a suit in the district court seeking a refund of the estate tax and interest paid on behalf of the estate. The district court granted the government's motion to dismiss, holding that it lacked subject matter jurisdiction because the estate's claim for

refund had not been timely filed pursuant to Section 6511 (a) of the Internal Revenue Code. Sheedy now appeals. For the reasons noted below, we affirm.

Section 7422(a) of the Internal Revenue Code of 1954 provides:

> "(a) *No suit prior to filing claim for refund.*— No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secreatry (sic) or his delegate established in pursuance thereof." 26 U.S.C. § 7422(a)

Section 6511(a) of the Code provides:

> "Period of limitation on filing claim—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. . . ." 26 U.S.C. §6511(a).

In this case, it is undisputed that the successor personal representative of the estate paid the estate tax no later than July 30, 1974, and filed a claim for refund no earlier than November 30, 1976. Accordingly, since more than two years elapsed between the paying of the tax and the filing of a claim for refund, the claim is time barred.



In this connection, we are not persuaded by the appellant's argument that (1) the statute is subject to equitable tolling or (2) the government is subject to equitable estoppel. It is well established that the statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed. *Soriano* v. *United States,* 352 U.S. 270, 276 (1957). Accordingly, "unlike general statutes of limitation which govern independently existing causes of action between private parties, the timeliness requirement [of § 7422(a)] is not procedural or remedial, but jurisdictional." *Kreiger* v. *United States,* 539 F.2d 317, 321 (3rd Cir. 1976). The courts have therefore held that the failure to file a claim for refund within the limitations period is a jurisdictional prerequisite and that the failure to file within that period is ordinarily not subject to equitable considerations. *See e.g., Bryan* v. *United States,* 99 F.2d 549 (10th Cir. 1938), *cert. denied,* 305 U.S. 661 (1939); *Kreiger* v. *United States, supra.*

In this case, we find no reason to depart from these well settled principles. Accordingly, the judgment of the district court is

AFFIRMED.

SUPREME COURT, U. S.
FILED
SEP 20 1979
MICHAEL RODAK, JR., CLERK

No. 79-180

# In the Supreme Court of the United States

OCTOBER TERM, 1978

PATRICK T. SHEEDY, PERSONAL REPRESENTATIVE FOR THE ESTATE OF CECELIA BINN, DECEASED, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 79-180

PATRICK T. SHEEDY, PERSONAL REPRESENTATIVE FOR THE ESTATE OF CECELIA BINN, DECREASED, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the decision below holding that the district court properly dismissed his suit for refund of federal estate taxes for lack of jurisdiction on the ground that no timely claim for refund had been filed.

The pertinent facts are as follows: Cecelia Binn died on April 1, 1967, and Oscar Binn was appointed as personal representative for her estate. On November 19, 1969, he filed an estate tax return which showed a tax due of $32,430.05. No payment, however, was made with the return. Subsequently, Oscar Binn was removed as personal representative because of his failure to properly administer and close the estate. On October 3, 1973, petitioner was appointed as the successor personal

representative. He inquired of the Internal Revenue Service as to whether an estate tax return had been filed and was erroneously informed that no return had been filed. The Service also advised petitioner that a tax was due. On April 18, 1974, petitioner thereafter filed another estate tax return reporting a liability of $27,017.50. The full amount of the reported tax, plus $9,788.25 in interest, was paid on or about July 30, 1974 (Pet. App. 1-2; R. 2-5).[1]

On November 11, 1976, the Internal Revenue Service advised petitioner by letter that, although the original personal representative had not paid any of the taxes due, a previous estate tax return had in fact been filed on November 19, 1969. The letter further stated that because the statutory period in which any estate tax could be assessed and collected on the first return had expired, the July 1974 payment made by petitioner could not be retained by the Service without a letter from petitioner stating that the payment was voluntary. More than two years later, on November 30, 1976, petitioner requested a refund of the amount paid. Subsequently, the Internal Revenue Service advised petitioner that no refund would be made because it had determined that a refund was not allowable because no claim for refund was filed within the applicable statute of limitations[2] (Pet. App. 1-2; R. 5-6, 11-12).

In this refund suit brought by petitioner in the United States District Court for the Eastern District of

[1]"R." refers to the record appendix filed in the court of appeals.

[2]The November 30, 1976, request was made more than two years after the estate remitted payment, and more than three years after the initial estate tax return was filed. Thus, treating petitioner's November 30, 1976 letter as a claim for refund, the claim was filed beyond the required time limitations set forth in Section 6511(a) of the Internal Revenue Code of 1954 (26 U.S.C.).



Wisconsin, the district court dismissed the action for lack of jurisdiction because of the estate's failure to file a timely claim for refund (Pet. App. 1-4). The court of appeals affirmed. It rejected petitioner's contentions that the government should be estopped from raising the bar of the statute of limitations and that equitable considerations should toll the statute of limitations (Pet. App. 5-7).

1. The court of appeals correctly held that the district court had no jurisdiction to consider petitioner's action for a refund of taxes because a timely claim for refund had not been filed.

The jurisdictional basis for suit against the United States for refund of taxes is 28 U.S.C. 1346(a)(1). Congress, however, has conditioned the government's consent to be sued in such cases upon the timely filing of an administrative claim for refund. See Section 7422(a) of the Internal Revenue Code of 1954. This provision uniformly has been interpreted as establishing a jurisdictional requirement that cannot be waived. *E.g.*, *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931); *Ancel* v. *United States*, 398 F. 2d 456, 458 (7th Cir. 1968); *Crismon* v. *United States*, 550 F. 2d 1205 (9th Cir. 1977); *Bruno* v. *United States*, 547 F. 2d 71 (8th Cir. 1976); *Kreiger* v. *United States*, 539 F. 2d 317 (3d Cir. 1976); *Lewis* v. *Sandler*, 498 F. 2d 395, 399-440 (4th Cir. 1974); *United States* v. *Rochelle*, 363 F. 2d 225, 231 (5th Cir. 1966).

The relevant timeliness requirements in Section 6511(a) of the Code provide that the claim for refund must be filed within three years from the time the return was filed, or within two years from the time the tax was paid, whichever expires later. Here, more than two years elapsed between the payment of the tax and petitioner's

filing of a claim for refund. Thus, petitoner's claim is barred by the statute of limitations and the district court had no jurisdiction to hear the suit.[3]

2. Petitioner contends (Pet. 7-12) that the general statutory authority in 28 U.S.C. 1340 confers jurisdiction on the district court to decide cases involving the federal revenue, whether or not the plaintiff files a timely claim for refund, and that, by virtue of this grant, the district courts may exercise inherent equitable powers to hear the suit and provide relief.

But Section 1340 is merely the general grant of jurisdiction to district courts to entertain actions of a certain class, *viz.*, "any civil action arising under any Act of Congress providing for internal revenue." It is well established that in order to confer jurisdiction over the United States, Section 1340 must be read in the light of any other statutory conditions imposed by Congress for waiving the government's sovereign immunity. See, *e.g.*, *Essex* v. *Vinal*, 499 F. 2d 226, 231 (8th Cir. 1974); *Guerkink Farms, Inc.* v. *United States*, 452 F. 2d 643, 644 (7th Cir. 1971); *DeMasters* v. *Arend*, 313 F. 2d 79, 84 (9th Cir. 1963), cert. dismissed, 375 U.S. 936 (1963); First *National Bank of Emlenton, Pa.* v. *United States*, 265 F. 2d 297, 299 (3d Cir. 1959). It is therefore clear that the district court correctly held that it had no jurisdiction to hear this case in the absence of a timely claim for refund. *Essex* v. *Vinal*, *supra*.

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[3]It is undisputed that petitioner paid the estate tax no later than July 30, 1974, and filed the informal claim for refund on November 30, 1976 (Pet. App. 6). The two-year period from the time the tax was paid is used because it results in a later expiration date, July 30, 1976, than the expiration of the three-year period from the date the initial estate tax return was filed on November 19, 1969. The district court correctly held, and petitioner did not argue otherwise, that it is only the initial return filed, and not a later filing, which is relevant for purposes of the statute. See *Goldring* v. *Commissioner*, 20 T.C. 79, 81 (1953).



Contrary to petitioner's argument (Pet. 7-12), *Porter* v. *Warner, Co.*, 328 U.S. 395 (1945), and *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), do not conflict with the decision below. They stand for the proposition that where Congress by statute has granted jurisdiction to a court, giving it the equitable power to enforce prohibitions contained in a regulatory enactment, implied in that grant is the power to provide complete relief in light of the statutory purpose. Subject matter jurisdiction, however, is distinct from the question of the remedies a federal court may make available. See *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 11-12 n. 18. Those cases do not support the existence of subject matter jurisdiction based on an equitable estoppel theory. There is no authority holding that a district court has subject matter jurisdiction over a tax refund suit in the absence of a timely claim for refund.

3. Petitioner also contends (Pet. 13-22) that the doctrine of equitable tolling should be applied to enlarge the period of limitations so as to render its claim to be timely. But the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In view of this Court's admonition in *Soriano* regarding implied exceptions to the conditions imposed by the government in giving its consent to be sued, the courts have consistently held that equitable exceptions to the jurisdictional requirements of the statute are not permitted. *Kreiger* v. *United States*, *supra*; *Crismon* v. *United States*, *supra*; *Bryan* v. *United States*, 99 F. 2d 549 (10th Cir. 1938), cert. denied, 305 U.S. 661 (1939).

This rule is as applicable to tax refund actions as to any other suit against the United States. *United States* v. *Michel*, 282 U.S. 656 (1931); *Kreiger* v. *United States*,

*supra*, 539 F. 2d at 321; *Kaltreider Cosntruction, Inc.* v. *United States*, 303 F. 2d 366 (3d Cir.) cert. denied, 371 U.S. 877 (1962); *Bryan* v. *United States*, *supra*, 99 F. 2d at 552. Thus, the time limitations set forth in Section 6511(a) of the Code cannot be equitably tolled, even where it is alleged the taxpayer's failure to file a timely claim for refund was a result of fraudulent concealment by the government or some third party. *Kreiger* v. *United States*, *supra*; *Bryan* v. *United States*, *supra*. Although this Court in *Bailey* v. *Glover*, 88 U.S. 342 (1874), and *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), held that a statute of limitations was tolled as a result of fraudulent concealment, those cases did not involve suits against the sovereign and the attendant principle that the conditions attached to the sovereign's consent to be sued must be strictly construed.[4] *Kreiger* v. *United States*, *supra*, 539 F. 2d at 321.

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[4]At all events, the facts here do not support estoppel against the government. The original personal representative filed an estate tax return but remitted no payment as he was required to do without assessment or notice and demand. Sections 6151 and 2002 of the Internal Revenue Code of 1954. Petitioner cannot insulate the estate from the acts and knowledge of the original personal representative. During the course of administering an estate, numerous personal representatives may succeed one another, but the collection of the revenue cannot be made subject to the identity of the particular fiduciary representing the estate. Moreover, estoppel against the government has been applied in other circumstances only in rare situations involving an unconscionable injury. See *Schuster* v. *Commissioner*, 312 F. 2d 311, 317 (9th Cir. 1962). Here, the estate has paid only one estate tax, and at most has been deprived of a windfall. Significantly, it seeks to profit not only from the Commissioner's apparent error in misplacing the original return, but also from the dereliction of duty of its initial personal representative in failing to make payment when due. In these circumstances, equitable estoppel is inappropriate.



It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

SEPTEMBER 1979

DOJ-1979-09

FILED
NOV 5 1979
MICHAEL RODAK, JR., CLERK

No. 79-180

# In the Supreme Court of the United States

OCTOBER TERM 1979

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**PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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# In the Supreme Court of the United States

OCTOBER TERM 1979

## No. 79-180

**PATRICK T. SHEEDY, Personal Representative for the Estate of CECELIA BINN, Deceased,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your Petitioner, Patrick T. Sheedy, Personal Representative for the Estate of Cecelia Binn, deceased, respectfully prays that the Court reconsider its order denying his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, in the above entitled cause, entered by this Court on October 15, 1979, and grant the Petition.

As grounds for this Petition, Petitioner respectfully requests the Court's consideration of the following:

On October 15, 1979, the petitioner received notification from the Supreme Court of the United States that its Petition for Writ of Certiorari had been denied. The con-

tents of the letter were extremely brief, and the grounds for the denial were not stated therein. It leads this petitioner to believe that the Supreme Court of the United States denied the Writ of Certiorari on the basis of a jurisdictional question. According to a noted treatise on the subject of jurisdiction; "There are other unusual circumstances under which a petition for rehearing may not be granted. Certiorari may have been denied originally for a jurisdictional reason, and the petitioners may be able to show the Court that it was in error."[1] It is the intention of this petitioner to show the court that it was in error to deny this writ.

**I. The respondent incorrectly addressed the jurisdictional issue in their MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.**

The jurisdictional basis for suits against the United States for refund of taxes is 28 U.S.C. §1346(a)(1). Congress has limited the government's consent to be sued in such cases to those parties that filed a timely refund claim. *See,* Section 7422(a) of the Internal Revenue Code of 1954.

Since there was no case law cited in the letter the petitioner received from the Court denying their writ, petitioner assumes that the respondent's MEMORANDUM FOR THE UNITED STATES IN OPPOSITION stands for the Supreme Court's position on the issue. The jurisdictional error herein, rests with this Court's misplaced reliance on the respondent's case law. In the respondent's MEMORANDUM (p. 3), it was stated that "This provision uniformly has been interpreted as establishing a jurisdictional requirement that cannot be waived." This rule

[1] R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States*, §317 (2d ed. R. Wolfson & P. Kurland 1951).



of law, is followed by case law that fails to address the key issue in this matter, to-wit; Whether fraudulent concealment is an exception to the jurisdictional bar?[2] The Su-

[2] On page three (3) of the respondent's MEMORANDUM FOR THE UNITED STATES IN OPPOSITION, the respondent has a chain citation of cases that are in support of the rule of law that it set forth therein. Your petitioner has checked each case and finds multiple flaws with the respondent's supportive case law.

In *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931), the ". . . object of such requirement [timely refund claim] is to advise officials of the demands or claims to be asserted. . ." The case states nothing in support of the theory that the jurisdictional requirement cannot be waived, but rather recognizes reasons for allowing a waiver and cites *Tucker* v. *Alexander*, 275 U.S. 228 (1927).

In *Ancel* v. *U.S.*, 398 F. 2d 456, 458 (7th Cir. 1968), the court decided that 26 U.S.C. §6511(a) applied to taxpayers as well as transferees. The decision never addressed the issue of fraudulent concealment.

*Crimson* v. *U.S.*, 550 F. 2d 1205 (9th Cir. 1977). The appellants filed an incorrect refund form. The court held that it was an insufficient refund claim. The court made no reference to fraudulent concealment.

*Bruno* v. *U.S.*, 547 F. 2d 71 (8th Cir. 1976). The case stated that there was no suit unless there is exact compliance with 26 U.S.C. §6511(a). The decision, however, does not dismiss fraudulent concealments, but rather distinguishes it. Furthermore, the plaintiff in this matter had prior knowledge that the bonds seized were due.

*Kreiger* v. *U.S.*, 539 F. 2d 317 (3rd Cir. 1976). This case is addressed more fully in this petition for rehearing. *See,* page 7, infra.

*Lewis* v. *Sandler*, 498 F. 2d 395, 399-400 (4th Cir. 1976). The decision ruled that failure to file a refund claim is fatal, yet they cite their reliance upon *U.S.* v. *Felt & Tarrant Mfg. Co., supra.* This case was discussed and dismissed above as to the issue of fraudulent concealment.

Lastly, *U.S.* v. *Rochelle*, 363 F. 2d 225, 231 (5th Cir. 1966). This case can be distinguished from the issue of fraudulent concealment because the plaintiff had prior knowledge of the improper collection of taxes.

preme Court's reliance upon this case law is misplaced and has led this court to render an erroneous decision on the jurisdictional issue.

**II. Reliance of the Supreme Court on the Seventh Circuit's order is misplaced due to the fact that the case law fails to meet the issue and is not in point.**

If this court relied on the case law found in the Seventh Circuit's order denying reversal of the district court's ruling, it too would lead to the rendering of an erroneous decision. There, in considering the jurisdictional bar, the Appellate court refused to grant jurisdiction on the grounds that the petitioner's claim failed to meet the requirements set forth in I.R.C. §6511(a). The court based its decision on three cases: *Soriano* v. *United States,* 352 U.S. 270, 276 (1957); *Kreiger* v. *United States,* 539 F. 2d 317, 321 (3rd Cir. 1976); and *Bryan* v. *United States,* 99 F. 2d 549 (10th Cir. 1938), *cert. denied,* 305 U.S. 611 (1939). Careful analysis of these decisions completely distinguishes them from the facts in the case at bar.

First, in the case of *Soriano* v. *U.S., supra,* the matter first came before the Court of Claims and not before a Federal District Court. The case dealt with the question of whether or not war would be a valid basis for the tolling of the relevant statute of limitations. The party making the allegations knew that the "disability had ceased", but erroneously assumed that the statute of limitations for compensation for requisitioning had been tolled due to the war. This is not the situation found herein.

Your petitioner never received notification of the illegally assessed taxes. It was not until 4 months after the 2 year statute of limitations had run against the petitioner that there was any indication or notice that a tax return



had been filed in 1969 by the previous personal representative of the estate.

Furthermore, *Soriano* v. *U.S., supra,* states that ". . . enforcement of the rule might result in hardship in some cases . . ." *Id.* at 321. Had the I.R.S. been a private citizen, this "hardship" would have fallen on their shoulders. The statute of limitations found in I.R.C. §6501(a) for the assessment of taxes is three (3) years from the date that the initial tax return is filed. In the present case three (3) years had passed from the initial filing on November 19, 1969 and long before the time Attorney Sheedy contacted the I.R.S. in October, 1973. When Attorney Sheedy was appointed by the court as successor personal representative to the Estate of Cecilia Binn, he inquired of the I.R.S. as to whether an estate tax return had been filed. He was misrepresented to, and led to believe that no return had ever been filed, and that the tax was due and owing. Had it not been for the fraudulent misrepresentation to Attorney Sheedy, collection of the estate taxes would have been precluded by the running of the statute of limitations found in I.R.C. §6501(a). The court will note that had Attorney Sheedy been the party to perpetrate the fraud herein, the I.R.S. would be able to avoid the three (3) year statute of limitations imposed by §6501(a), for it has been stated that: "Proof as to fraud as to any one of the alleged deficiencies permits a general reaudit of the return in its entirety, and the statute of limitations is tolled as to all deficiencies." *U.S.* v. *Diehl,* 460 F. Supp. 1282, 1287 (1978), *Aff'd,* 586 F.2d 1080. *See also, Lowy* v. *Commissioner of Internal Revenue,* 288 F. 2d 517 (2d Cir. 1961), (L. Hand, J.), *cert. denied,* 368 U.S. 984 (1961). It is inequitable to hold that the I.R.S. is able to toll the statute of limitations where the taxpayer may not.

The *Diehl* Court stated, "It is important to note that the government's purpose in seeking to prove fraud in

this case is limited solely to avoidance of the 3 year statute of limitations." *Id.* at 1287. We too, as petitioners for the rehearing of the order denying the writ, limit the allegations of fraud to the issue involving the tolling of the statute of limitations. This petitioner has not "slept on his rights so as to make the decree against the [respondent] unfair." *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396 (1945); *See also, Russel* v. *Todd,* 309 U.S. 280 (1939).

This Court has also mistakenly relied upon *Bryan* v. *U.S., supra,* which is quoted in the Seventh Circuit's Order refusing to reverse the district court's decision that there is lack of jurisdiction. The fact situation, as set forth in *Bryan* v. *U.S.,* is substantially distinguished from the facts set forth herein. In *Bryan,* the I.R.S. agents, as well as the directors of the plaintiff's corporation, collaborated in the perpetration of fraud. In essence the petitioner, via an agency relationship, received notice that his taxes were illegally assessed and consequently he should have filed a refund claim within the time set forth in I.R.C. §6511(a). The court ruled that the I.R.S. agents had acted beyond the scope of their duties and therefore, the government could not be held liable. It is submitted that the case of *Bryan* is unique in that the government could not readily evaluate or deny the allegations made and thus it placed an unreasonable burden upon the government's orderly administrative functions.

The petitioner in this case never received notification, either directly or indirectly, until four (4) months after the two (2) year statute of limitations had run. Furthermore, this matter never involved a third party concealment as was found in *Bryan.* This, when coupled with the fact that the I.R.S. was the only party that did possess the information necessary to establish taxes due by the estate, further exemplifies the difference between *Bryan*



and the case at Bar. The I.R.S. agents did not go beyond the scope of their duties, but rather failed to meet the demands of their job. Their inefficiency and neglect should not be tolerated at the expense of the public who relies on such privileged information.

Lastly, the appellate court, in examining the jurisdictional issue, relied upon the case *Kreiger* v. *U.S., supra.* Your petitioner contends that the case is applicable, but that the appellate court was in error to apply the general rule found therein while failing to note the exception to that rule. It is the contention of this petitioner that the present case falls under the exception noted in the *Kreiger* decision. A careful analysis of the facts therein, leads one to conclude that the petition for rehearing must prevail upon the issue of fraudulent concealment. *Kreiger* states, "Limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions are not to be implied." *Id.* at 321. The rationale behind this rule, i.e., of strict adherence to the specified statute of limitations, ". . . is to protect defendants from unfair surprise." *Id.* at 322. The decision rendered goes even further to declare; ". . . *tolling makes sense only where such unfairness is not a consideration because the defendant's willful or negligent conduct has caused the delay. E.g. Holmberg, supra (fraudulent concealment)* . . . *That is not the case here.*" (Emphasis supplied). Clearly the court in rendering its decision made a distinction between the facts found therein and the fact situation arising under *Holmberg* v. *Ambrecht,* 327 U.S. 392 (1945). In *Holmberg* the Supreme Court ruled:

> . . . And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains ignorant of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there is no special cir-

> cumstances of efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

327 U.S. 392. *See also, Baily* v. *Glover,* 21 Wall 342, 348 (1875).

The petitioner cited this case in his Petition for Writ of Certiorari and the respondent, in its MEMORANDUM, was unable to cite case law refuting this rule. There is no case law that will undermine the rule because, "This equitable doctrine is read into every federal statute of limitations." *Id. See, Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 393 (1958); *Lemon* v. *Kurtzman,* 411 U.S. 201 (1972). The respondent addressed the problem by stating that the *Holmberg* and *Baily* cases did not involve a suit against a sovereign. This conclusion is erroneous especially when it is recognized in *Kreiger* v. *U.S., supra,* which is a case against the government.

The *Kreiger* decision goes one step further to clarify the rule set forth; "In addition, we note that it does not appear that concealment necessarily prevented the filing of a timely claim for refund." *Id.* at 322. The petitioner makes it clear to this court that it is concealment, and only concealment, that prevented the attorney from filing a timely refund claim herein. No amount of reasonable diligence would have altered the present situation.

**III. It is not a issue of sovereignty before the court, but rather the question of whether or not the I.R.S. can lawfully conceal information that would allow the petitioner to exercise its privilege to sue the government as is granted in I.R.C. §6511(a).**

It is clear that the legislature has made an exception to the theory of sovereign immunity by enacting I.R.C. §6511 (a). President Lincoln said in a message to Congress; "It



is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." Quoted in *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573 (1946). The area of basic contention does not revolve around whether sovereign immunity is desirable or not, but rather on what is the proper manner in which the doctrine should be applied. Here, the government has agreed to entertain suits against it in tax matters, and it should not be within the power of the I.R.S. to circumvent that intention through fraudulent concealment.

**IV. The final jurisdictional issue is to determine whether or not District Courts are able to freely exercise jurisdiction over equitable matters.**

In *Porter* v. *Warner,* 328 U.S. 395 (1945), the Court stated;

> Unless otherwise provided by statute all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .

328 U.S. 395. *See also, Mitchell* v. *Demario,* 361 U.S. 288 (1959).

The appellate court, by affirming the District Court's decision, has improperly overruled the *Mitchell* and *Porter* cases in that the district court stated; ". . . General principles of equity may not be applied in tax cases . . ." (*See,* App. 4 in Petition for Writ of Certiorari). It is respectfully submitted that the District Court failed to follow the *Mitchell* and *Porter* decisions.

Consequently, to deny this petition for Writ of Ceriorari would be to allow the perpetration of fraud by the I.R.S.

upon the people in tax matters. The basis of the dilemma rests in equity, but even more so, this Court cannot deny the rehearing of the issue on the basis that it fails to meet a jurisdictional requirement. There is no case law to support this decision. It is clear that Congress has created a privilege to sue the sovereign in certain instances, however, when the legislature sees fit to make an exception to the rule of sovereign immunity, it should not be within the power of the taxing officials to circumvent the statute of limitations set out in I.R.C. §6511(a) and §6501(a) through the means of fraudulent concealment and malfeasance.

## CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted, for it has been stated:

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation or exclude the injured party from legal redress . . ."

*Marbury* v. *Madison*, 1 Cranch 137 (1803).

Respectfully submitted,

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